

DO NOT FILE BY MAIL

WILEY, REIN & FIELDING

1776 K STREET, N.W.
WASHINGTON, D. C. 20006
(202) 429-7000

June 13, 1994

WRITER'S DIRECT DIAL NUMBER

FACSIMILE
(202) 429-7049

(202) 828-4901

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of Fairfield Communications, Inc.
Implementation of the Commission's Equal Employment
Opportunity Rules, MM Docket 94-34

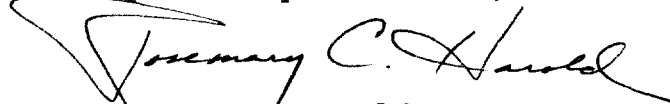
Dear Mr. Caton,

Submitted herewith on behalf of Fairfield Communications, Inc. ("Fairfield"), are its comments responding to the Commission's Notice of Inquiry ("Notice") in the above-referenced matter. As specified in the Notice, Fairfield's filing consists of the original document and five copies of same.

Please stamp the enclosed duplicate as received and return it for our records via the messenger effectuating this filing.

Kindly direct any questions concerning this matter to the undersigned.

Respectfully submitted,


Rosemary C. Harold

Enclosures

No. of Copies rec'd
List A B C D E

HS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of) MM Docket No. 94-34
The Commission's Equal)
Employment Opportunity Rules)

To: The Commission

COMMENTS OF FAIRFIELD COMMUNICATIONS, INC.

Fairfield Communications, Inc. ("Fairfield"),¹ by its attorneys, submits herewith the following comments in response to the Commission's Notice of Inquiry ("Notice") in the above-referenced matter. In our view, recent developments concerning enforcement of the Commission's Equal Employment Opportunity ("EEO") rules threaten to overwhelm smaller broadcast stations without materially advancing the underlying goals of the rules.

The Commission's EEO rules are intended to serve two related public-interest objectives: to "advance program diversity" and to "enhance access by minorities and women to increased employment opportunities." Notice at ¶ 1. Fairfield strongly supports these goals and, through its licensee companies, has implemented its own carefully tailored EEO compliance review procedures to help bring about needed improvements. Thus,

¹ Fairfield is a management company established, in part, to provide operational services for the licensee entities of the following radio stations: KEZY(FM) and KORG-AM, Anaheim, California; WEBE-FM, Westport, Connecticut; WICC(AM), Bridgeport, Connecticut; WMXN(FM), Norfolk, Virginia; WQAL(FM), Cleveland, Ohio; and WUNO(AM) and WFIO(FM), Rio Piedras, Puerto Rico.

Fairfield undertakes aggressive efforts to recruit and employ qualified minorities and women, including ongoing outreach to minority and women's organizations, regular self-assessment of its recruitment and employment practices, and maintaining detailed records on those practices.

On the other hand, Fairfield is deeply disturbed that the Notice might result in the imposition of even more complex tasks and concomitant record-keeping, which we earnestly believe would be counter-productive.² Indeed, rather than adding more layers of regulation, Fairfield believes that there is a dire need for specific relief from existing EEO enforcement procedures that have recently been announced.

The Commission apparently has begun to recognize that its EEO policies have had a disproportionate negative impact on broadcasters "located in small markets" because of factors inherent in those broadcasters' circumstances. Notice at ¶ 21 (discussing possible accommodations in EEO rules or policies for "small market" stations). Fairfield can vouch that this recognition has merit, because the radio stations it manages share many of the same inherent problems. While the Fairfield-

² Some of the proposals that appear likely to add to broadcasters' burdens include, but are not limited to, requiring stations to search for "minority and female entrepreneurs" for outside consulting and contract jobs; effectively requiring radio licensees to retain voluminous recruitment and hiring records throughout their entire seven-year license term; and mandating that broadcasters complete even more complicated, detailed FCC report forms than those in current use. See Notice at ¶¶ 23, 27, 28-29.

managed stations may be located in mid-sized or larger markets, they -- like "small market broadcasters" -- are relatively small businesses that face many of the same constraints in attracting qualified female and minority applicants.

Because Fairfield continues to experience genuine practical difficulties in undertaking its recruitment and employment efforts, the company is especially disturbed by the Commission's new EEO Policy Statement, 9 FCC Rcd. 929 (1994) ("Policy Statement"), which seems to exalt numerical administrative systems over policy substance. Fairfield sympathizes with the Commission's desire to provide licensees with more objective criteria by which to gauge compliance, but we respectfully suggest that, in attempting to do so, the agency has inadvertently created a system which can unfairly penalize licensees -- particularly smaller stations in any sized market -- who strive in good faith to comply with the EEO rules.

Specifically, Fairfield is troubled by the Policy Statement's revolutionary emphasis on "applicant pool" numbers. For example, under this new policy, a \$12,500 base forfeiture (accompanied by annual reporting conditions) will be imposed on renewal applicants who fail to recruit so as to attract an "adequate" pool of minority and female applicants or hires for at least two-thirds of all vacancies during the review period. See, e.g., San Luis Obispo Limited Partnership, FCC 94-21 (rel. Feb. 1, 1994) (although licensee hired at 100% parity during relevant period, station received reporting conditions, \$25,000

fine, and short-term renewal for record-keeping deficiencies and failure to attract adequate applicant pools). In other words, not only must licensees demonstrate that they have made efforts to recruit and hire minorities, they now stand at risk of receiving reporting conditions, forfeitures, and short-term renewals if they are unable to demonstrate that these efforts produced specific results -- i.e., by being able to show that one or more minority applicants or interviewees actually appeared in a given number (66%) of applicant pools.

This new policy creates extreme difficulties for stations such as ours. As Fairfield's own Form 395 data makes clear, the vast majority of jobs in most radio stations are bunched in the "professional," or so-called "top four," categories. Thus, a high percentage of job openings at most radio stations require specialized experience and knowledge in programming, engineering, or advertising sales. Conversely, most radio stations have a relatively small percentage of job openings for entry-level positions requiring little or no prior experience or skill.

By their very nature, then, smaller broadcast stations also have fewer positions -- and thus fewer openings -- in the non-broadcast specific jobs reflected in the EEO rules' "bottom four" categories such as office and clerical workers, craft workers, laborers, and service workers. The job profile of a typical radio station thus stands in marked contrast to both that of larger media entities and of other types of small businesses offering direct "retail" services to the public. Larger media

entities, like any large enterprise, are more likely to have significant numbers of nonprofessional staff to support their general operations. Other types of small businesses, such as those in the many service industries, are apt to employ a large percentage of clerical, general administrative, unskilled, or semi-skilled laborers whose work is controlled by a thin layer of professional managers.

In addition, smaller stations must compete with larger stations, large station groups, and networks for the relatively small pool of experienced minority or female applicants in the broadcast fields. Regardless of market size, smaller broadcast stations generally offer smaller salaries and more limited opportunities for advancement. While location alone may not always be a hindrance, all small stations have precisely the same problem of convincing sought-after minority or female applicants to forego attractive opportunities offered by bigger broadcast enterprises. The factors at issue in any one situation may involve a combination of salary, opportunities for career advancement, station format, or some more unique concern. In any case, it is Fairfield's observation that many qualified minority and female potential applicants simply do not give certain radio stations even a first chance to "sell" the benefits of working in such an environment.

Because this situation unfortunately exists, it is unfair, and fundamentally unproductive, to hold broadcasters in general -- and smaller stations in particular -- accountable for the one

step in the recruitment and hiring process over which they have absolutely no control: the response of applicants to the station's publicized job openings. The FCC's focus instead should remain on those steps in the employment process over which stations do have some control, the hiring decisions and the publicizing of job openings.

As Fairfield understands it, under the Policy Statement stations face sanctions whenever they fail to attract minority and/or female applicants for two-thirds of all job openings during the license term. Sanctions will be imposed in such cases even if a station's employment profile exceeds the percentages of minority or female workers in the local labor force, and without regard to the station's good-faith efforts to recruit qualified minority or female applicants. Thus, the Policy Statement makes licensees ultimately responsible for the actions and decisions of third parties -- minority and female job seekers. This is patently unfair, particularly in the context of smaller stations which must compete for experienced applicants against larger, more diversified broadcast operators or other media-related enterprises.

Although the Policy Statement is characterized as merely constituting processing guidelines for staff enforcement of the rules, it is well understood that the "guidelines" approach to enforcement is tantamount to a rule. At the very least, the Commission should clarify on the record that the guidelines will be interpreted flexibly to take into account facts specific to

each case.³ As explained further below, the Commission should make it clear that documented station efforts to recruit women and minorities for at least 66% of job openings will satisfy the guideline standards, regardless of the ultimate success in attracting specific minorities and/or women to enter 66% of all applicant pools.

Therefore, Fairfield respectfully urges the Commission to devise a specific "smaller station" exemption from the Policy Statement's applicant-pool percentage test that would recognize the inherent difficulties that such stations have in attracting and retaining minority and female employees. At the outset, Fairfield suggests that the Commission should define "smaller station" as any broadcast station (regardless of market size) employing forty (40) or fewer full-time employees. The specific exemption could take the following form:

STEP 1: Smaller stations with employment profiles that satisfy the existing numerical "processing guidelines" (e.g., 50% of the applicable labor force percentages, in most instances) would be presumed to be in compliance and, absent a specific showing of discrimination, exempt from further EEO analysis.⁴

³ The Commission's staff has indicated informally that good-faith recruitment efforts will be taken into account in cases where a station fails to meet the guidelines' standard for applicant pool percentages. As discussed below, Fairfield maintains that this informal understanding should be explicitly incorporated in the Policy Statement.

⁴ Fairfield is aware that the Policy Statement currently permits a possible downward adjustment in sanctions if the station in question has met the Commission's established numerical processing guidelines. The type of exemption we are
(continued...)

STEP 2: Smaller stations with employment profiles below the numerical guideline level would be required to demonstrate that they followed adequate measures in reasonably contacting minority- and female-specific or other productive sources. This would be demonstrated by the following test:

- (a) In at least 66% of all job openings during the last three years of the license term, representative sources were contacted, or
- (b) In at least 50% of all job openings during the last three years of the license term representative sources were contacted, so long as the recruitment sources included "joint recruitment efforts [with] other broadcasters." Notice at ¶ 25.

When challenged, a smaller station capable of demonstrating one of these levels of recruitment effort should be deemed to satisfy EEO requirements for purposes of renewal and thus not face EEO sanctions.⁵

In addition to this exemption, Fairfield offers two suggestions for "downward adjustment" in any forfeiture stemming from employment profiles or recruitment efforts that fall below guideline levels. Fairfield believes that these policies would send appropriate "signals" to licensees that the Commission's interest lies in fundamental improvements in female and minority

⁴(...continued)
proposing, however, would provide more specific needed relief well before the sanction stage would even be reached.

⁵ While this proposed change in Commission standards is specifically directed toward "smaller stations" with forty or fewer full-time employees, we believe that it could legitimately be applied to virtually all broadcast stations, for both practical and policy reasons.

access to the industry, and not simply in numerical quotas for the license term in question.

First, Fairfield respectfully suggests that substantial mitigation be granted when stations can show that they have made efforts to retain and promote existing female or minority employees. Cf. Notice at ¶ 24 (recognizing possible "glass ceiling" problem and soliciting comments on retention and promotion of minority and female employees). Id. at ¶ 24. And second, the Commission's mitigation policies should afford credit to stations that participate in or contribute to programs designed to expose minority or female youngsters to the broadcast industry and train those youngsters in the skills needed for employment. Programs run jointly with other broadcasters should qualify under this proposal, as should programs run solely by a station or a station group.

Fairfield believes that these mitigation policies would lay a solid, long-lasting foundation for the Commission's goal of enhancing access to the industry. They also avoid the pitfalls inherent in the numbers-based scheme of the Policy Statement.

In conclusion, Fairfield re-emphasizes that it has no quarrel with the Commission's overall EEO compliance policies. But it urges the FCC to recognize that the Commission does damage to EEO goals by essentially holding licensees liable for the

responses that job notices elicit, regardless of the merits of the station's good-faith efforts to attract qualified applicants.

Respectfully submitted,

FAIRFIELD COMMUNICATIONS, INC.

By:



Carl R. Ramey
Rosemary C. Harold
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

June 13, 1994